77-942

Supreme Court, U. S.
FILED
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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 77-3236

FRANK REYNOLDS, Petitioner

v.

JUDGE JOSEPH W. WETLI, Respondent

Petition for a Writ of Certiorari to the
United States Court of Appeals for
the Sixth Circuit

Joseph L. Newman
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Cleveland, Ohio 44114
Attorney for Petitioner

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-vs-

JUDGE JOSEPH L. WETLI

Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

The Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in the above case on July 21, 1977.

OPINIONS BELOW

The opinions relevant to this petition were issued by the United District Court for the Northern District of Ohio, Western Division in Reynolds v. Wetli Civil No. 75-431 (N.D. Ohio, W. Div., March 31, 1977) and by the United States Court of Appeals in the Sixth Circuit in Reynolds v. Wetli No. 77-3236 (6th Cir. July 21, 1977 and September 30, 1977) all are reproduced and attached hereto at Appendix, pages i to vii .

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was made and entered on July 21, 1977. A petition for Rehearing was denied on September 30, 1977. The jurisdiction of this Court is invoked under 28 USC Sec. 1254 (1).

QUESTIONS PRESENTED IN REVIEW

Whether criminal liability for possession of undersized fish can attach upon an owner of a boat solely because of that ownership?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The constitutional provisions involved are the due process and equal protection clauses of the Fifth Amendment as made applicable to the states by the Fourteenth Amendment. The statute under which the defendant was convicted was Ohio Rev. Code Sec. 1531.02 pursuant to the definition established by Ohio Rev. Code Sec. 1531.01 (H). The provisions are set forth at appendix, pages viii to x .

STATEMENT OF THE CASE

The ownership of the boat was stipulated by the defendant. The state proved that defendant was not on and had not been on the boat. The state further proved that some fish on the boat were undersized. The defendant was convicted of possession of the fish and sentenced to 10 days in jail and fined $750. Appeals were pursued through the state systems. After denial a Petition for Habeas Corpus was filed in the District Court. The District Court concluded

criminal liability under these circumstances was not a violative of due process but granted a certificate of probable cause while denying the writ. The Court of Appeals decided the question raised was one of fact and therefore not cognizable in federal habeas corpus and granted a Motion to Affirm.

REASONS FOR GRANTING THE WRIT

While the Court of Appeals decision is erroneous because the issue raised is not sufficiency of the evidence, the real difficulty is the denial of due process created by the District Court's decision. First of all to convict someone for possession because he was "any control of things referred to". Ohio Rev. Code Sec. 1531.01 (H) where the control is ownership of the boat on which the things were found not only fails to comport with the notice requirements of due process but is facially void for vagueness. Second, irrespective of the construction applied to State law, to convict one for possession of fish held by another is vicarious criminal liability for possession of non-contraband substances, a concept not supported by decisions of this or any other Court.

There is, moreover, an equal protection aspect to this case arising from the effect of Ohio decisional law. Ohio has already decided that the Statute is unconstitutional as applied to truck drivers of undersized fish Ohio v. Williams 94 Ohio. App. 249 (1952) and actual owners of undersized fish Ohio v. Euclid Fish Company 95 O.L.A. 1 (1964), if proof offered is only that of their control of the fish without actual knowledge. Thus, there is an irrational distinction among those having "any control".

CONCLUSION

The decision below represent a unique departure from the due process principles that one cannot be convicted of a crime committed by another, that one not be proven guilty because of one's status, and the knowledge of some element of the offense being committed is essential. This petition for writ of certiorari should therefore be granted.

Respectfully submitted,

/s/ Joseph L. Newman

Joseph L. Newman
740 Leader Building
Cleveland, Ohio 44114
Counsel for Petitioner

CERTIFICATE OF SERVICE

A copy of the foregoing Petition for a Writ of Ceriorari was mailed to James J. Martin, Assistant Attorney General, Counsel for Department of Natural Resources, Fountain Square, Building C, Columbus, Ohio 43224 and to Tom Schlageter, Acting Prosecutor, City of Oregon, Oregon, Ohio, by certificate mail, postage prepaid, return receipt requested, this 29th day of December, 1977.

/s/ Joseph L. Newman

Joseph L. Newman

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 77-3236

FRANK REYNOLDS, Petitioner

v.

JUDGE JOSEPH W. WETLI, Respondent

Petition for a writ of Certiorari to the
United States Court of Appeals for
the Sixth Circuit

A P P E N D I X

ORDER OF THE COURT OF APPEALS
NO. 77-3236
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FRANK REYNOLDS
Petitioner-Appellant

vs.

JUDGE JOSEPH L. WETLI
Respondent-Appellee

(Entered September 30, 1977)

Before WEICK, EDWARDS and CELEBREZEE, Circuit Judges.

Upon consideration, it is ORDERED that the petition for rehearing be and it is hereby denied.

ORDER OF THE COURT OF APPEALS
NO. 77-3236
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FRANK REYNOLDS
Petitioner-Appellant

vs.

JUDGE JOSEPH L. WETLI
Respondent-Appellee

(Entered July 21, 1977)

Before WEICK, EDWARDS and CELEBREZZE, Circuit Judges.

Upon consideration it is ORDERED that the motion to affirm the Order of the District Court denying petitioner-appellant's application for a writ of habeas corpus be and it is hereby

granted and the judgment is affirmed for the reasons stated by the District Judge in his opinion, the principal reason being that federal review by habeas corpus of a criminal conviction in a state court does not extend to the sufficiency of the evidence.

ORDER OF THE UNITED STATES DISTRICT COURT
NO. C 75-431
NORTHERN DISTRICT OF OHIO

FRANK REYNOLDS
Petitioner
vs.
JUDGE JOSEPH WETLI
Respondent

(Entered March 31, 1977)

This cause came to be heard on petitioner's motion for a certificate of probable cause to appeal this Court's denial of petitioner's application for a writ of habeas corpus, filed pursuant to Rule 22(b), Federal Rules of Appellate Procedure, and in compliance with 28 U.S.C. § 2253.

The history of this case is somewhat confused and requires explanation. On September 9, 1974, petitioner herein was tried and convicted of several violations of the wildlife statutes and regulations of the State of Ohio, including unlawful possession of undersized walleye in violation of Ohio Revised Code § 1531.02, and Ohio Division of Wildlife Rule, Chapter NRW-3 Rule 02,§A, 4. The evidence adduced at trial, viewed in the light most favorable to respondent, was essentially as follows.

Petitioner Reynolds at all times relevant hereto was a commercial fisherman licensed by the State of Ohio. Petitioner's fishing license listed the "Bayhawk" as one of the boats used in the petitioner's fishing operation.

On May 4, 1974, the Bayhawk was brought to dock at petitioner's fish house by Darryl Spence, skipper of the boat and an employee of the petitioner. Petitioner was not on the Bayhawk when it docked, but did arrive at the dock a short time later aboard the "Propagotor, another commercial fishing boat used by Reynolds.

When the Bayhawk docked it was promptly boarded by agents of the Ohio Division of Wildlife, who observed fish on the deck and also observed that the door to the cabin of the Bayhawk was locked. The agents requested that Spence unlock the cabin for their inspection, but he refused. Petitioner Reynolds then arrived at the dock and he also was asked to unlock the cabin. Reynolds likewise refused to do so.

The agents then secured a search warrant, broke into the cabin of the Bayhawk, and found eight-six (86) pounds of walleye, sixty percent (60%) of which were determined to be "undersized." After the fish were found Reynolds boarded the Bayhawk and replaced the broken lock. That was the first time the evidence showed Reynolds to have actually been on board the Bayhawk.

Based on this evidence, Reynolds was found guilty of Ohio Revised Code §1531.02, which makes unlawful the possession of wildlife except in accordance with the provisions of the Ohio Revised Code and the orders of the Division of Wildlife. Ohio Division of Wildlife Rule 02(A) makes unlawful the possession of "undersized" walleye. Ohio Revised Code §1531.02(E), denies "possession" to mean "both actual and constructive possession and

any control of things referred to."

The petitioner appealed to the Sixth District Court of Appeals of Ohio, which affirmed his conviction for unlawful possession of walleye,[1] stating that the "record reveals facts proving beyond reasonable doubt that defendant was guilty of both counts charging defendants with illegal possession of walleye." On petitioner's motion for reconsideration, the Ohio Court of Appeals adhered to its decision affirming petitioner's conviction and, in effect upheld, on the facts of this case, the imposition of criminal liability absent proof of guilty knowledge or scienter.

Petitioner's appeal to the Ohio Supreme Court was dismissed on the court's own motion for failure to present a substantial constitutional question.

Thereafter, petitioner filed his application for a writ of habeas corpus, alleging the following grounds:

> I. The petitioner('s) fifth amendment right, as protected by the fourteenth amendment, not to be deprived of life, liberty or property without due process of law was violated by petitioner('s) conviction for criminal conduct of another involving possession when no evidence demonstrated any possession or knowledge

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[1]The Ohio Court of Appeals did reverse the petitioner's conviction for interference with a game protector, in violation of Ohio Revised Code Sec. 1533.67, for the reason that no probative evidence was found in the record to support the conviction.

of the petitioner justifying said conviction.

II. The petitioner('s) fourth amendment right, as protected by the fourteenth amendment, to be protected against unreasonable search and seizure was violated by issuance of a search warrant authorizing a forcible search against a vessel owned by him when no probable cause was shown for said search.

Upon petitioner's motion, an Order staying execution of petitioner's sentence of incarceration pending final determination of the issue presented was entered.

Petitioner concedes that he is foreclosed from further asserting his Fourth and Fourteenth Amendments search and seizure claim by Stone v. Powell, 96 S.Ct. 3037 (1976). Therefore, only ground I above need be considered on petitioner's motion for a certificate of probable cause.

On its initial review of petitioner's application for a writ of habeas corpus, this Court read petitioner's first ground for relief to raise only a challenge to the weight and sufficiency of the evidence to establish petitioner's "possession" of the illegal walleye. The Court reviewed the trial transcript and determined that the record was not "totally devoid" of evidentiary support for petitioner's conviction, and accordingly denied the petitioner's application for a writ of habeas corpus on the grounds that petitioner had failed to state a claim cognizable in federal habeas corpus. For further discussion of this issue see Reynolds vs. Wetli, No. C 75-431 (N.D. Ohio, Nov. 24, 1975).

Following the Court's denial of petitioner's application for a writ of habeas corpus, petitioner filed a Notice of Appeal in the Sixth Circuit Court of Appeals. The Sixth Circuit dismissed petitioner's appeal for failure of the petitioner to apply to the district court for a certificate of probable cause as required by Rule 22, Federal Rules of Appellate Procedure and 28 U.S.C. Sec. 2253.

Thereafter, the petitioner filed the instant motion for a certificate of probable cause. In reviewing said motion it became clear to the Court that petitioner's first claim for relief was not merely a challenge to the sufficiency of the evidence, but rather included a challenge to the constitutionality of Ohio Revised Code Sec. 1531.02, as applied to him. Specifically, it is the petitioner's contention that Ohio Revised Code Sec. 1531.02, imposes strict liability and allows imposition of criminal sanctions absent a finding of scienter, or guilty knowledge, and therefore violates his rights under the Due Process Clause of the Fifth and Fourteenth Amendments. In the interest of judicial expediency, the Court determined that it was necessary to decide the merits of this issue before ruling on petitioner's motion for a certificate of probable cause, and therefore granted the respondent leave to submit a memorandum of law. The question has now been briefed by both parties and is before the Court for a determination.

Although the respondent contends that there is sufficient evidence in the record from which the "guilty knowledge" of the petitioner might be inferred, the Court will assume, arguendo, that the

challenged statute, as applied to the petitioned in this case, imposes strict criminal liability. It is now well established, however, that the mere fact that a statute imposes strict liability does not render the statute constitutionally invalid. Numberous decisions of the United States Supreme Court have recognized the authority of legislatures to enact statutory schemes defining a criminal certain conduct which does not include the element of guilty knowledge, provided such statutes are part of a regulatory scheme in furtherance of the public health, safety, and welfare. See generally United States v. Salint, 258 U.S. 250 (1922); United States v. Dotterweich 320 U.S. 277 (1943). And at least two judicial decisions have approved legislative enactments designed to conserve wildlife resources which omitted scienter as an element of criminal liability. See United States v. Jamra, 491 F. 2d 764 (4th Cir. 1974); United States v. Ireland, 493 F. 2d 1208 (4th Cir. 1973).

In light of this authority, this Court cannot find that the imposition of strict liability in the instant case violated petitioner's constitutional right to due process of law.[2] Therefore, the Court will adhere to its decision of March 25, 1976, denying petitioner's application for a writ of habeas corpus.

However, as the constitutional question posed by the petitioner's application for a writ of habeas corpus is neither insubstantial or frivolous, the Court will grant petitioner's application for a certificate of probable cause.

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[2]The Petitioner relies on the authority of State v. Williams, 94 Ohio App. 249 (Sandusky Co. 1952), and State v. Euclid Fish Company, 95 O.L.A. 1 (Ct. App. Cuyahoga Co. 1964). However, those cases expressly limited their holding to the facts presented, and were distinguished from the instant case by the Ohio Court of Appeals. See State v. Reynolds, C.A. No. 7620 (Ct. App. Lucas County, filed May 23, 1975). The question as to whether Ohio Revised Code § 1531.02, was intended to impose strict criminal liability is a matter of state statutory construction and is therefore not cognizable by this Court.

CONSTITUTION OF THE UNITED STATES

AMENDMENT V

No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the

militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

AMENDMENT XIV

Section I

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life; liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

OHIO REVISED CODE.

1531.01 Definitions; taking of quail and fox
As used in Chapters 1531. and 1533. of the Revised Code:

(H) "Possession" means both actual and constructive possession and any control o. things referred to.

1531.02 State ownership of wild animals

The ownership of and the title of all wild animals in this state, not legally confined or held by private ownership legally acquired, is in the state, which holds such title in trust for the benefit of all the people. Individual possession shall be obtained only in accordance with the Revised Code or division of wildlife orders. No person shall at any time of the year take in any manner or possess any number of quantity of wild animals, except such wild animals as the Revised Code or division orders permit to be taken, hunted, killed, or had in possession, and only at such time and place, and in such manner, as the Revised Code or division orders prescribe. No person shall buy, sell, or offer any part of wild animals for sale, or transport any part of wild animals except as permitted by the Revised Code or division orders. No person shall possess or transport a wild animal which has been taken unlawfully outside the state.

A person doing anything prohibited or neglecting to do anything required by Chapter 1531 or 1533. of the Revised Code, or contrary to any division order violates this section. A person who counsels, aids, shields, or harbors an offender under such sections or divisions order, or who knowingly shares in the proceeds of such violation, or receives or possesses any wild animal in violation of the Revised Code or division order violates this section. No person shall hunt a wild bird or wild quadruped on Sunday or use a rifle, at any time, in taking migratory game birds.

Supreme Court, U. S.
FILED
FEB 13 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-942

FRANK REYNOLDS,

Petitioner

vs.

JOSEPH L. WETLI,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW AND JURISDICTION

The opinions below and jurisdictional requirements are adequately set forth in the Petition. The opinions below are reproduced in Petitioner's Appendix and, therefore, are not reproduced herein.

QUESTION PRESENTED

Whether the imposition of criminal sanctions, pursuant to Section 1531.02 of the Ohio Revised Code, absent a finding of *scienter*, for the unlawful possession of undersized fish violates the rights of Petitioner, a licensed commercial fisherman, to due process of law and to equal protection under the law as guaranteed by the Fifth and Fourteenth Amendments.

STATEMENT OF THE CASE

On September 9, 1974, Petitioner was found guilty of the unlawful possession of undersized fish, in violation of Section 1531.02 of the Ohio Revised Code, which were concealed upon a boat, the Bay Hawk, owned by Petitioner. An appeal was unsuccessfully pursued through the state court system resulting in the affirmance of this conviction. In his Statement of the Case, however, Petitioner fails to fully set forth the facts upon which this conviction was based. As determined by the Ohio Court of Appeals upon review and as indicated by the federal district court in its Order denying Petitioner's application for a writ of habeas corpus (reproduced in Petitioner's Appendix, pp. ii, iii), the pertinent facts supporting Petitioner's conviction are that Petitioner was at all times a commercial fisherman licensed under the laws of the State of Ohio; that Petitioner is the owner of the Bay Hawk which he uses in his commercial fishing operation; that the Bay Hawk was under the supervision and control of Petitioner's employees; that, although Petitioner was not on board the Bay Hawk when it docked at Petitioner's fish house, he did arrive at the dock a short time later aboard another commerical fishing boat owned by Petitioner; that both Petitioner and his employee each refused to grant permission to the game protectors involved to inspect without a search warrant the locked cabin of the Bay Hawk, although such inspection is authorized by Ohio statutory law; and that Petitioner himself placed a new lock on the Bay Hawk cabin door after the game protector, having obtained a search warrant, had cut off the lock to inspect the cabin. Thus, Petitioner's Statement of the Case is grossly inadequate in setting forth the facts supporting his conviction, as determined by the lower courts.

After the unsuccessful appeal through the state court system, Petitioner sought habeas corpus relief in federal district court which precipitated the proceeding herein. As is pertinent to this proceeding, the petition for a writ of habeas corpus was denied for the reasons that, as concluded by the district court, (1) questions going to the weight and sufficiency of evidence adduced at a criminal trial which results in a conviction are generally not cognizable in a federal habeas corpus proceeding unless the record is totally devoid of evidentiary support, and the record in this case is *not* devoid of evidentiary support that Petitioner had constructive possession of the "illegal" fish; and (2), to the extent that Petitioner contends that Section 1531.02 of the Ohio Revised Code imposes strict criminal liability and allows imposition of criminal sanctions absent a finding of *scienter,* or guilty knowledge, the imposition of strict liability in the instant case does not violate Petitioner's constitutional right to due process of law. In making this latter determination, the district court recognized the Respondent's contention that there is sufficient evidence in the record from which the "guilty knowledge" of the Petitioner might be inferred, but for the sake of argument, assumed that the statute in question imposed strict criminal liability. (Petitioner's App., p. ii.) Although the district court denied Petitioner's application for a writ of habeas corpus, the court granted Petitioner's motion for a certificate of probable cause.

The United States Court of Appeals for the Sixth Circuit, upon review, affirmed the order of the district court for the reasons stated by the district court in its opinion. (Petitioner's App., pp. i, ii.) Although the court of appeals did indicate that its principal reason for affirmance was that federal review by habeas corpus of a criminal conviction in a state court does not extend to the sufficiency of the evidence, the court's order does indicate, contrary to Petitioner's assertion in his Statement of the Case, that it adopted all the reasons stated by the district court. It is this Order of the Sixth Circuit Court of Appeals that Petitioner requests this Court to review upon certiorari.

ARGUMENT

I. Questions relating to the weight and sufficiency of evidence adduced at a state criminal trial, resulting in a criminal conviction, are not subject to federal review by habeas corpus.

Upon reading Petitioner's application to this Court for a writ of certiorari, it is difficult to understand exactly what issue is being raised by Petitioner. As presented by Petitioner, the issue is vague, and further, to the extent that an issue is raised at all, it is based upon an assumed factual situation which does not reflect the actual state of facts in the case at bar. In stating the issue, Petitioner submits that his conviction is based *solely* upon his ownership of a commercial fishing boat. Such is simply not the case. The full extent of the evidence adduced at trial supporting Petitioner's conviction, as set forth in the Statement of the Case herein, is chronicled in the district court's Order denying Petitioner's application for a writ of habeas corpus (*Reynolds v. Wetli,* Civil No. 75-431 (N.D. Ohio, entered March 31, 1977), reproduced in Petitioner's Appendix at p. ii, and hereinafter referred to as "Order"). Petitioner's conviction is supported by more than just his ownership of the Bay Hawk.

In view of his attempt to minimize the evidence adduced at trial and to construe the evidence as inadequate, Petitioner's submission that his conviction is based solely upon his ownership of the Bay Hawk can only be viewed as an attempt to induce this Court to review the sufficiency of the evidence in the context of a federal habeas corpus proceeding. The Sixth Circuit Court of Appeals refused to conduct such a review, as did the district court below. It is well settled that questions going to the weight and sufficiency of evidence adduced at a criminal trial which results in a criminal conviction are generally not cognizable in a federal habeas corpus proceeding. *See, Harlan v. McGourin,* 218 U.S. 442 (1910); *Perkey v. Cardwell,* 369 F. Supp. 770 (S.D. Ohio, 1973), *aff'd,* 492 F. 2d 1244 (6th Cir. 1974); *Cunha v. Brewer,* 511 F. 2d 894 (8th Cir.), *cert. denied,* 423 U.S. 857 (1975); *Young v. Alabama,* 443 F. 2d 854 (5th Cir. 1971), *cert. denied,* 405 U.S. 976 (1972); *Phillips v. Pitchess,* 451 F. 2d 913 (9th Cir. 1971), *cert, denied,* 409 U.S. 854 (1972); *Mathis v. Colorado,* 425 F. 2d 1165 (10th Cir. 1970). In the instant case the evidence adduced at trial was reviewed by the Ohio Court of Appeals and the court concluded that the record reveals facts proving beyond a reasonable doubt that Petitioner was guilty of the unlawful possession of undersized fish. *State of Ohio v. Reynolds,* Case Nos. 74-202, 74-203, 74-204 (C. A. Ohio, Lucas Cty., February 28, 1975). Reviewing the record upon Petitioner's application for a writ of habeas corpus, the district court below determined that the record is

not "totally devoid" of evidentiary support for Petitioner's conviction. (Petitioner's App., p.v.) The court of appeals below affirmed the district court conclusion that federal review by habeas corpus does not extend to sufficiency of the evidence. These determinations are in accord with the decisions of this Court and of the various circuit courts. Accordingly, to the extent that Petitioner is requesting this Court to review the sufficiency of the evidence, he has presented no basis justifying the granting of the instant petition for a writ of certiorari.

II. The imposition of strict criminal liability for the unlawful possession of undersized fish is not violative of the constitutional guarantee to due process of law under the Fifth and Fourteenth Amendments.

Petitioner attempts to argue that the question presented is more than just a consideration of the sufficiency of the evidence, that there has been a violation of his constitutional rights to due process of law as well as to equal protection under the law. To the extent that Petitioner is arguing that he was denied due process of law for the reason that his conviction was allegedly based upon a determination that, due solely to his ownership of the Bay Hawk, he had possession of the "illegal" fish found on his boat while it was engaged in a commercial fishing operation, his argument is really no more than a contention, as verbalized by the district court below in its Order, that Section 1531.02 of the Ohio Revised Code imposes strict liability and allows imposition of criminal sanctions absent a finding of *scienter*, or guilty knowledge, and therefore violates his rights under the due process clause of the Fifth and Fourteenth Amendments. The district court, affirmed by the court of appeals, concluded that there had been no violation of Petitioner's constitutional rights. These decisions are clearly correct.

There is no question but that a statute may impose strict criminal liability without being constitutionally infirm. As Justice Harlan indicated in *Chicago B. & Q. Ry. v. United States*, 220 U.S. 559, 578 (1911):

> The power of the legislature to declare an offense, and to exclude the elements of knowledge and due diligence from any inquiry as to its commission, cannot, we think, be questioned.

See also, *United States v. Balint*, 258 U.S. 250 (1922).

On the facts of the instant case, the Ohio Court of Appeals in effect, as construed by the district court below in its Order (Petitioner's App., p. iv), upheld the imposition of criminal liability absent proof of guilty knowledge or *scienter*. In affirming Ohio's construction of its criminal laws relative to the protection, conservation, and management of the state's wildlife resources, the decisions of the district court and the court of appeals are not inconsistent with the decisions of other federal courts under similar circumstances.

In *United States v. Jarman*, 491 F. 2d 764 (4th Cir. 1974), the defendants had been convicted of violating a law designed for the protection of wildlife which prohibited the hunting of game birds on and over a baited area. On appeal defendants argued, *inter alia*, that *scienter* should be made a part of the offense. Rejecting this argument, the court stated at 491 F. 2d, 766:

> Courts have held, repeatedly, however, that Congress may create a crime and omit *scienter* as an element so that even an unknowing violation will support a conviction. And this is especially true, as here, where the offenses charged have no common law origins. United States v. Dotterweich, 320 U.S. 277, 64 S. Ct. 134, 88 L. Ed. 48 (1943); United States v. Balint, 258 U.S. 250, 42 S. Ct. 301, 66 L. Ed. 604 (1922); United States v. Schultze, 28 F. Supp. 234 (W. D. Ky, 1939). Cf. Morrissette v. United States, 342 U.S. 236, 72 S. Ct. 240, 96 L. Ed. 288 (1952).

In accord are *United States v. Ireland*, 493 F. 2d 1208 (4th Cir. 1973), and *United States v. Tarmon*, 227 F. Supp. 480 (D. Md. 1964).

The import of these decisions is that strict liability is a proper standard for criminal liability and the lack of *scienter* as an element of a criminal statute designed to preserve wildlife does not give rise to a constitutional question. Thus, the decisions below of the court of appeals and the district court, concluding that Petitioner has not suffered any deprivation of due process under the law, are clearly correct.

In contrast, Petitioner has presented no authorities in support of his Petition. Petitioner's argument is founded simply on his conclusory statement that the concept of convicting one "for possession of fish held by another is vicarious criminal liability for possession of non-contraband substances" and is not supported by decisions of this or any other court. First of all, the concept of strict criminal liability in matters pertaining to the protection, conservation, and management of wildlife resources *is* supported by other courts as indicated above. Petitioner has presented no authorities demonstrating the decision herein of the court of appeals to be in conflict with the decision of any other court of appeals on this matter. Secondly, whether or not to impose strict criminal liability under the circumstances herein is a matter of Ohio law to be determined by the courts of Ohio. The instant case does not present an important, indeed, any question of federal law, nor has the court of appeals decided an important state question in conflict with the applicable state law. Finally, even if Petitioner's conclusory argument were accepted, it is not applicable to the instant case because it is inaccurate. Petitioner suggests that he has been held criminally liable for the possession of "non-contraband substances." To the extent that "contraband," as that term is generally understood, includes property the possession of which is a crime, [1] the undersized fish in the instant case are clearly contraband property since Ohio law makes it unlawful to possess certain named species of fish under a specified size. Even so, Petitioner has cited no authority to support his conclusory statements. In sum, Petitioner has presented no special or important reasons why this court should grant the petition for a writ of certiorari.

[1] See, e.g., Rule 41 (b) of the Ohio Rules of Criminal Procedure (and also Rule 41 (B) of the Federal Rules of Criminal Procedure) which provides that a warrant may be issued to search for and seize any "(2) contraband, the fruits of crime, or things otherwise criminally possessed."

III. Petitioner's conviction for the unlawful possession of undersized fish is not violative of the equal protection clause of the Fifth and Fourteenth Amendments.

Petitioner submits that there is "an equal protection aspect to this case arising from the effect of Ohio decisional law." In support of his argument Petitioner merely cites two Ohio cases. A brief analysis of those cases, however, shows that the argument is simply without merit.

In *Ohio v. Williams*, 94 Ohio App. 249 (Sandusky Cty., 1952), the court determined that the imposition of criminal liability upon truck drivers hauling fish for the unlawful possession of undersized fish was unconstitutional without proof of *scienter*. In *Ohio v. Euclid Fish Co.*, 32 Ohio Op. 2d 85 (C. A. Cuyahoga Cty., 1964), the court similarly determined that criminal liability without proof of *scienter* cannot constitutionally be imposed for the unlawful possession of undersized fish upon the owners of said fish under circumstances where the fish had been imported from Canada in sealed crates. On their facts, these cases are fundamentally different from the case at bar for these cases involve the application of Ohio law to *different* classes of persons. The instant case does not involve the conviction of a truck driver hauling goods, i.e., fish in sealed crates, nor does it involve the conviction of the owner of fish which were imported from outside Ohio. Rather, it involves the conviction of a licensed commercial fisherman for the unlawful possession of undersized fish while engaged in commercial fishing operations. Indeed, in both *Williams* and *Euclid Fish Co.*, the court explicitly distinguished the facts under consideration therein from the situation, as here, where undersized fish were found on a commercial fishing boat. Finally, upon Petitioner's motion to reconsider, the Ohio Court of Appeals explicitly determined that *Williams* and *Euclid Fish Co.* are not applicable to the case at bar.

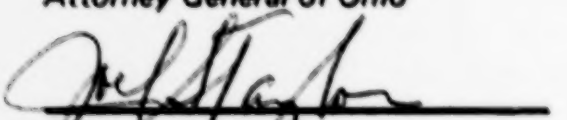
In conclusion, Petitioner has failed to raise any substantial federal question or to demonstrate any special or important reasons why this Court should grant the petition for a writ of certiorari.

CONCLUSION

Rule 19(1) of the Rules of the Supreme Court of the United States sets forth guidelines for granting a petition for a writ of certiorari. The general thrust of these guidelines is that a writ of certiorari will be granted only where "there are special and important reasons therefor." None of the arguments presented by Petitioner are within the specific guidelines ennumerated in Rule 19(1) nor do said arguments present any other special or important reasons for granting the petition. As discussed in the Argument above, the reasons asserted by Petitioner are woefully inadequate to justify the issuance of a writ of certiorari to the Sixth Circuit Court of Appeals in this matter. For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

WILLIAM J. BROWN
Attorney General of Ohio



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CERTIFICATE OF SERVICE

I hereby certify that three (3) copies of the foregoing Brief for Respondent in Opposition were served upon Joseph L. Newman, Counsel for petitioner, at 740 Leader Building, Cleveland, Ohio 44114, by ordinary mail, first class postage prepaid, this 10 day of February, 1978.

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